Supreme Court, U.S.
FILED
APR 23 2005
OFFICE OF THE CLERK

NO. 04-1282

In The Supreme Court Of The United States

TIEN FU HSU, et al.,

Petitioners,

vs.

COUNTY OF CLARK, a political subdivision of the State of Nevada,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court of the State of Nevada

---

REPLY BRIEF IN SUPPORT OF CERTIORARI

KERMITT L. WATERS
JAMES JACK LEAVITT
LAW OFFICES OF
KERMITT L. WATERS
704 South 9th Street
Las Vegas, NV 89101
Telephone: (702) 733-8877

MICHAEL M. BERGER*
MANATT, PHELPS & PHILLIPS
11355 West Olympic Boulevard
Los Angeles, CA 90064-1614
Telephone: (310) 312-4000
**Counsel of Record*

GIDEON KANNER
P.O. Box 1741
Burbank, CA 91507
Telephone (818) 848-6765

Attorneys for Petitioners

TABLE OF CONTENTS

Page

I THE 5TH AMENDMENT DETERMINES A TAKING BY WHAT A STATE DOES, NOT BY WHAT IT SAYS 1

II THIS CASE INVOLVES A PHYSICAL TAKING OF PROPERTY FOR PUBLIC USE BECAUSE CLARK COUNTY'S ACTIONS WERE AVOWEDLY DESIGNED TO ALLOW AIRCRAFT TO INTRUDE INTO PRIVATE PROPERTY AS PART OF THEIR OPERATIONS AT THE COUNTY'S AIRPORT 4

III AS USEFUL AS THIS COURT'S *PENN CENTRAL* DECISION MAY BE IN OTHER CIRCUMSTANCES, IT HAS NOTHING TO DO WITH THIS CASE 5

IV THE STATE COURTS ARE IN HOPELESS CONFLICT ON APPLYING THE 5TH AMENDMENT IN CASES LIKE THIS 7

V THE COUNTY'S BRIEF DEMONSTRATES THE NEED FOR A REVIEW OF AIRPORT LAW 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Beach v. Ocwen Federal Bank,
523 U.S. 410 (1998) 8

Davis v. Newton Coal Co.,
267 U.S. 292 (1925) 1

Dolan v. City of Tigard,
512 U.S. 374 (1994) 4

Griggs v. Allegheny County,
369 U.S. 84 (1962) 9, 10

Hughes v. Washington,
389 U.S. 290 (1967) 1

Kaiser-Aetna v. United States,
444 U.S. 164 (1979) 4

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982) 4, 7

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 3, 7

Nollan v. California Coastal Comm'n,
483 U.S. 825 (1987) 3

Penn Central Transp. Co. v. City of New York,
438 U.S. 104 (1978) 5, 6, 7, 8

Sneed v. County of Riverside,
32 Cal. Rptr. 318 (Cal. App. 1963). 5

TABLE OF AUTHORITIES
(continued)

Page

United States v. Causby,
328 U.S. 256 (1946)) 5, 9, 10

Williamson County Reg. Plan. Comm'n v. Hamilton Bank,
473 U.S. 172 (1985) 6

TEXTS

Jan G. Laitos, *Height Restrictions Near Airports: Physical Takings, Regulatory Takings, or Police Power Exercises?*
55 Land Use Law & Zoning Digest,
no. 9, at p. 4 (Sept. 2003) 2

I

THE 5TH AMENDMENT DETERMINES A TAKING BY WHAT A STATE *DOES*, NOT BY WHAT IT *SAYS*

The County urges that there can be no taking of property because the ordinance it drafted to benefit its own airport does not explicitly order the use of the Petitioners' property by overflying aircraft. This approach totally ignores the County's own evidence as well as the law

First, eighty years ago, this Court concluded that the words crafted by government do not determine the legality of its actions – the determinative matter is the effect of the actions themselves: "The incantation pronounced at the time is not of controlling importance; our primary concern is with the accomplishment." (*Davis v. Newton Coal Co.*, 267 U.S. 292, 301 [1925].) More recently, the rule was summarized this way: ". . . the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does." (*Hughes v. Washington*, 389 U.S. 290, 298 [1967][Stewart, J., concurring].)

Second, the County wholly disregards what it *did* through its ordinance, ignoring in the process the undisputed evidence produced below – including evidence given by its own witnesses – showing that the effect of the ordinance was to allow the use of the subject property for physical intrusion (in the pilots' sole discretion) by aircraft using the County-owned McCarran International Airport. Thus, William Dunlay, the County's aviation expert testified (as quoted by the Nevada Supreme Court):

> "Q. And the reason that's done is because planes may on occasion need to go into that area for aeronautical operations. Correct?

"A. Yes. That's my understanding, just to provide some maneuvering room down close to the runway.

"Q. For airplanes to go into if they need to; correct?

"A. Yes." (Pet. App., p. 13.)

Third, that evidence led the trial court to summarize that it was "undisputed . . . that the reason for the height limitations on this property is [so the property] . . . can be used by airplanes . . . . [A]irport personnel . . . are clear that the space is necessary and that it is used." (Pet. App., p. 53.)

Fourth, the evidence was also clear to the County's legal consultant, a well-known land use academic who – after trial – published an article about the case in a nationally distributed planning journal, noting that the airspace immediately above the Petitioners' property had been "set aside for possible use by incoming and outgoing aircraft. . . . The purpose of the Transition Zone is to allow aircraft the temporary use of airspace above privately owned property." (Jan G. Laitos, *Height Restrictions Near Airports: Physical Takings, Regulatory Takings, or Police Power Exercises?* 55 Land Use Law & Zoning Digest, no. 9, at p. 4 [Sept. 2003].)[1]

---

[1] The County's response to this *factual* summary is that Professor Laitos agrees with the County's *legal* position. (Br. in Opp., p. 18, n. 11.) That is hardly shocking (after all, Professor Laitos concededly worked with the County to develop its legal theory). However, the fact that the County had no comment on the professor's accurate recounting of the trespassory facts speaks volumes for the bankruptcy of the County's argument here, because the undisputed facts *do*

There is thus no legitimate dispute about the effect of the County's actions: they were designed to allow pilots to enter the Petitioners' airspace at their whim. That is the taking of an easement and requires compensation.[2]

The County's insistence that this Court look only at the words of its ordinance would not merely elevate form over substance, but would give Constitutional primacy to cleverness and imagination.[3] To accept the County's position would put a premium on hiring inventive draftspersons (rather than legal experts) for, as the Court put it in another 5th Amendment takings opinion, the only way for the government to lose (if wording were the test) would be to hire a "stupid staff." (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1025, n. 12 [1992].)

The cleverness *vel non* of the County's staff cannot be the line that divides the Constitutional from the void.

---

show the County's successful effort to make the Petitioners' property available for physical use for the benefit of the public.

[2] Seeking to minimize the economic impact of what it did to the Petitioners, the County downplays the value of this property by saying that it is half a mile from the Las Vegas Strip. (Br. in Opp., p. 2.) That's pretty close; it is one quarter of the length of Washington, D.C.'s National Mall.

[3] This Court has condemned "cleverness and imagination" as a substitute for Constitutional compliance. (*Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 [1987].)

II

THIS CASE INVOLVES A PHYSICAL TAKING OF PROPERTY FOR PUBLIC USE BECAUSE CLARK COUNTY'S ACTIONS WERE AVOWEDLY DESIGNED TO ALLOW AIRCRAFT TO INTRUDE INTO PRIVATE PROPERTY AS PART OF THEIR OPERATIONS AT THE COUNTY'S AIRPORT

The County is not pleased with the obvious impact of this Court's physical invasion cases on its actions. (Br. in Opp., pp. 23-24.)

Nonetheless, this Court made it clear in the series of decisions including *Kaiser-Aetna v. United States*, 444 U.S. 164 (1979); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987); and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), discussed in the Petition at pp. 17-18, that government action effectuating the entry of members of the general public onto private property – to use as though the property were publicly owned – is a 5th Amendment taking that cannot be done without just compensation.

In *none* of these cases did the government itself invade private property. In *all* of them, the regulations enabled third parties to trespass at will, just as in this case.

Repeatedly calling the regulation "traditional," "ordinary," or "common" (see Br. in Opp., pp. i, ii, 1, 8, 9, 15 [twice], 16, 17, 19, 20 [twice], 25 and 26) cannot alchemize this physical occupation of private property into a regulatory silk purse. Its effect, as plainly shown by the evidence – including the County's own expert witness – and the post-trial commentary of its own expert legal consultant, was to subject this property to physical public use by low

flying aircraft in the pilots' sole discretion, thus substantially impacting private use of the land's surface – just as this Court predicted in *United States v. Causby*, 328 U.S. 256, 262 (1946) (quoted *post*, p. 9).

The difference between "traditional" height restriction ordinances and height restrictions designed to allow public use for flight was clearly explained by a California Court:

> "We believe there is a distinction between the commonly accepted and traditional height restriction zoning regulations of buildings and the zoning of airport approaches in that the latter contemplates actual use of the airspace zoned, by aircraft, whereas in the building cases there is no invasion or trespass to the area above the restricted zone." (*Sneed v. County of Riverside*, 32 Cal. Rptr. 318, 320 [Cal. App. 1963].)

Just so.

III

AS USEFUL AS THIS COURT'S *PENN CENTRAL* DECISION MAY BE IN OTHER CIRCUMSTANCES, IT HAS NOTHING TO DO WITH THIS CASE

The Nevada Supreme Court accepted the County's invitation to evade the effect of this Court's physical taking cases and held that the way to determine whether a taking occurred here is to subject the matter to the *ad hoc*, multi-factor analysis outlined by this Court in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), which requires "ripening" through the administrative process of application for (and denial of) land use permits under

Williamson County Reg. Plan. Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).[4]

Clark County now urges this Court to magnify that error by approving it.

The fundamental problem is that *Penn Central* did not involve a physical taking, and thus has nothing to do with this Petition.[5]

Penn Central, as explained in the Petition, pp. 14-15, was not a physical taking case. It had nothing to do with governmental regulations enabling anyone to trespass on private property and use it at will. *Penn Central* was a pure aesthetic regulation case, one in which a government agency limited the use that an owner could make of private property, but did *not* authorize members of the public to make actual physical use of the property.

Penn Central involved regulation of the height of a proposed building to preserve the historical ambience of the Grand Central Terminal. Nothing in either the language or effect of New York City's ordinance subjected the property to actual public use. That is why, as the County accurately notes (Br. in Opp., pp. 16-17) no servitude was found in that case. Limiting building height is one thing; enabling actual public use of private airspace is markedly – and Constitutionally – different. There was no use by the public in *Penn Central*, which is why it does not apply here.

---

[4] A different aspect of *Williamson County* was argued in *Lingle v. Chevron U.S.A., Inc.*, No. 04-163.

[5] That is why, contrary to the County's alarum (Br. in Opp., p. 8), a decision in the Petitioners' favor would have no impact on *Penn Central*.

For the same reason, this ordinance is not (as the County argues) equivalent to a building "set back" ordinance that requires space to be left unused between a building and the street. (See Br. in Opp., p. 4.) Nothing in a set back ordinance authorizes or allows public entry on, or use of, private land.

It is the actual use of private property by the general public that separates physical from regulatory takings. When there is a physical taking, liability is *per se*, or "categorical." (*Loretto*, 458 U.S. at 427; *Lucas*, 505 U.S. at 1015.) The government must then compensate the owners regardless of the uses that may remain,[6] in contrast to regulatory taking cases, in which *Penn Central* mandates an *ad hoc* examination of the impact of government action on the owner's property rights as a whole.

IV

THE STATE COURTS ARE IN HOPELESS CONFLICT ON APPLYING THE 5TH AMENDMENT IN CASES LIKE THIS

State courts disagree on the precise issue raised here: when ostensible building height restrictions are imposed to enable the flying public to use the overlying, low level airspace, does the 5th Amendment require compensation?

The decisions reaching conflicting legal conclusions are collected in the Petition, at pp. 9-11 (requiring compensation), and pp. 11-12 (refusing compensation).

---

[6] In this Court's words, when there is a physical taking, government's obligation to compensate "does not depend on whether the volume of space it occupies is bigger than a breadbox." (*Loretto*, 458 U.S. at 438, n. 16.)

Amazingly, the County insists there is no conflict, although it was not able to convince even the Nevada Supreme Court of that proposition. (See Pet. App., p. 36, n. 88 [where that court collected contrary cases in a "but see" footnote]). What the County really means is that it doesn't care for the cases which disagree with its point of view. But that doesn't make the conflict either "fabricated" (Br. in Opp., p. 10) or non-existent (Br. in Opp., p. 9). Rather, it emphasizes the need for this Court's intervention.

That some of the opinions are older does not make them "outdated" (Br. in Opp., p. 12). Instead, they reflect settled law in those jurisdictions that has not been challenged because it is sensible and accepted.[7]

Nor were any of the conflicting cases falling on the County's side of the decisional divide affected by this Court's *Penn Central* decision, as the County asserts (Br. in Opp., p. 11). Not one of those cases even mentions *Penn Central*, much less uses its analysis to distinguish the contrary decisions in other jurisdictions.

Whether the County likes it or not, there *is* clear conflict among the state courts on this fundamental 5th Amendment issue. This Court needs to resolve it.

---

[7] The County's attempt to brush off some of the cases because they were decisions of intermediate appellate courts fails on two grounds. First, this Court has reviewed decisions of state supreme courts in part because of conflicts with intermediate appellate courts in other states. (E.g., *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 414-415, n. 5 [1998].) Second, the unquestioned longevity of those decisions shows that they *do* represent the settled law in those states.

V

THE COUNTY'S BRIEF DEMONSTRATES THE NEED FOR A REVIEW OF AIRPORT LAW

The Nevada Supreme Court narrowly read *United States v. Causby*, 328 U.S. 256 (1946) and *Griggs v. Allegheny County*, 369 U.S. 84 (1962), as applying essentially to noise cases. The County's brief would relegate physical takings like this to review under regulatory taking standards. (Br. in Opp., p. 26.)

Although more than half a century old, *Causby* made clear that low level aircraft flights severely diminish the utility of the subjacent land, even though "enjoyment and use of the land are not *completely* destroyed." (*Causby*, 328 U.S. at 262; emphasis added.) That fits harmoniously with this Court's more recent physical taking cases which mandate compensation for the taking of any interest, regardless of the nature of the diminished use remaining to the property owner. (See *ante*, p. 7, n. 6.)

> "The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain. But the use of the airspace immediately above the land would *limit* the utility of the land and cause a *diminution* in its value." (*Causby*, 328 U.S. at 262; emphasis added.)

Griggs echoed the same thought and placed on the airport operator the responsibility for acquiring all property interests needed to provide safe airport approaches. (369 U.S. at 89-90.) There is nothing "incongruous" (Br. in Opp., p. 19) about these Petitioners asking this Court to apply that precept to them. The point of this regulation is to

allow aircraft using the County's airport to operate safely. The County's felt need to create "maneuvering room [for pilots] down close to the runway" (Pet. App., p. 13) is a de facto concession that this taking is physical.

Causby and *Griggs* were decided in an era of noisy, propeller-driven aircraft, and focused on the nuisance aspects of aircraft flight. This Court needs to relate its later decisions on physical takings to the jet-age airport context. A physical taking of *any* interest requires just compensation to satisfy the 5th Amendment.

CONCLUSION

Petitioners pray that Certiorari be granted.

Respectfully submitted,

Kermitt L. Waters
James Jack Leavitt
Law Offices of
Kermitt L. Waters
704 South 9th Street
Las Vegas, NV 89101
(702) 733-8877

Michael M. Berger*
Manatt, Phelps & Phillips
**Counsel of Record*
11355 W. Olympic Blvd.
Los Angeles, CA 90064
(310) 312-4185

Gideon Kanner
P.O. Box 1741
Burbank, CA 91507
(818) 848-6765

Attorneys for Petitioners